

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION**

ALLEN WITHERALL,  
Plaintiff,

v.

DARRELL BELL, et al.,  
Defendants.

CV-17-38-GF-BMM-JTJ

**ORDER ADOPTING MAGISTRATE  
JUDGE'S FINDINGS AND  
RECOMMENDATIONS**

United States Magistrate Judge John Johnston entered Findings and Recommendations in this matter on December 11, 2017. (Doc. 23.) No party filed objections.

Given that no objections were filed, the Court has reviewed Judge Johnston's Findings and Recommendations for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). The Court finds no error in Judge Johnston's Findings and Recommendations, and adopts them in full.

**I.BACKGROUND**

Plaintiff Allen Witherall filed an Amended Complaint on May 16, 2017. (Doc. 7.) Judge Johnston issued an Order on November 6, 2017, finding that Witherall's Complaint failed to state a claim upon which relief could be granted.

(Doc. 22.) Judge Johnston's Order provided Witherall an opportunity to file a second amended complaint on or before November 30, 2017. (Doc. 22 at 28.)

Witherall has failed to file a second amended complaint.

## **II.DISCUSSION**

Judge Johnston recommends dismissal for Witherall's failure to file a second amended complaint. (Doc. 12 at 2.) Federal Rule of Civil Procedure 41(b) provides that the Court may dismiss an action for failure to comply with a court order.

*Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992).

The Court notes Witherall's *pro se* status. The Court must "liberally construe" *pro se* filings. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Nothing in the record indicates that Witherall has made an attempt to comply with Judge Johnston's order. Witherall's *pro se* status cannot overcome his failure to file a second amended complaint.

## **III.ORDER**

Accordingly, **IT IS ORDERED** that Magistrate Judge Johnston's Findings and Recommendations (Doc. 23) is **ADOPTED IN FULL**. Witherall's Complaint is **DISMISSED** for failure to state a federal claim.

The Clerk of Court is directed to close this matter and enter judgment in favor of Defendants pursuant to Rule 58 of the Federal Rules of Civil Procedure.

The Clerk of Court is directed to have the docket reflect that the Court

certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith. No reasonable person could suppose an appeal would have merit. The record makes plain the Complaint lacks arguable substance in law or fact.

The Clerk of Court is directed to have the docket reflect that this dismissal counts as a strike pursuant to 28 U.S.C. § 1915(g) because Witherall failed to state a claim upon which relief may be granted.

DATED this 31st day of January, 2018.



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Brian Morris  
United States District Court Judge